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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 907

N. V. HANDELSBUREAU LA MOLA,

Petitioner,

v.

ROBERT F. KENNEDY, Attorney General of the United States, as successor to the Alien Property Custodian,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S OPPOSITION

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INDEX

PAGE

Argument:

I 1

II 2

III 3

IV 4

V 5

VI 8

VII 9

Conclusion 11

CITATIONS

Cases:

Bank of the Philippine Islands v. *Rogers*, 165 F. Supp. 100 (D. C. 1958), aff'd 281 F. 2d 12 (D. C. Cir. 1959) 3

Bank Voor Handel en Scheepvaart N. V. v. *Kennedy*, 288 F. 2d 375 (D. C. Cir. 1961) cert. den. 366 U. S. 962 ..... 5, 6, 7

Clark v. *Uebersee Finanz-Korporation*, 332 U. S. 480 (1947) 8, 10

Cole v. *Young*, 351 U. S. 536 (1956) .....

Fleming v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111 (1947) 3

Guessefeldt v. *McGrath*, 342 U. S. 308 (1952) .. 9, 10

PAGE

Moser v. *United States*, 341 U. S. 41 (1951) ... 7

Thirty Hogsheads of Sugar v. *Boyle*, 9 Cran. 191 (1815) ... 5, 6

United States v. *American Trucking Ass'ns.*, 310 U. S. 534 (1940) ... 3

United States v. *Jackson*, 280 U. S. 183 (1930) 3

United States v. *Witkovich*, 353 U. S. 194 (1957) ... 3

Congressional Reports:

H. R. Rep. 85, 65th Cong., 1st Sess. (1917) ... 6

H. R. Rep. 1269, 79th Cong., 1st Sess. (1945) ... 10

Statutes:

Trading with the Enemy Act, 40 Stat. 411, as amended, Tit. 50 App. U. S. C. §1 *et seq.*, 2, 4, 5, 7, 8

Sec. 2(a) ... 9, 10

Sec. 5(b) ... 8, 10

Sec. 7 ... 8

Sec. 9(a) ... 2, 3, 4, 8, 9, 10

Sec. 32 ... 6, 9, 10

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I

Respondent boldly, and entirely without warrant, labels as "the undisputed facts", p. 6, the wholly insupportable contentions he made in both Courts below, but which have been found as fact by neither, nor administratively. See V, *infra*. Respondent's prior statement of the holding of the District Court (Pet., p. 5, fn. 1) and the action of the Court of Appeals in vacating the District Court's order, with directions to dismiss the complaint for want of jurisdiction (Resp. B., p. 6; Pet., App. A, p. a9, App. B, p. a10) no less than the opinion of the Court of Appeals (Pet., App. A, pp. a1 *et seq.*) make it incon-

trovertible that the *only* facts thus far determined concerning the petitioner are that the petitioner is a corporation organized under the laws of the Netherlands, and that the Netherlands were occupied by the enemy during the War. On these *facts*, and these facts alone, is the question presented whether the petitioner has standing to sue under §9(a) of the Act, or whether so long as the state of war, or the right to exercise the war powers continues, any property in the United States of residents and corporations of Allied or American territory occupied at any time during the war by the enemy, may, after such occupation has long since been terminated, be seized and confiscated as booty by the Executive.

II

Respondent's recklessness in reciting the "facts" is replaced, however, by timidity to the point of utter silence, pp. 1-14, when it comes to the legislative history of the Act, and the prior Executive interpretations of it by the Department of State, the Alien Property Custodian, and his own predecessors as Attorney General, with all of which the decision below is patently inconsistent and irreconcilable. Pet., pp. 19-28. Respondent thus leaves it wholly undisputed that the construction of the Act for which he contends, is contrary to both the Congressional purpose and intent in enacting it, and the meaning with which it has been consistently read by both the Congress and the Executive in the intervening forty-five years. Respondent's agreement, p. 8, fn. 1a, that this is a case of first impression, expressly confirms that his construction of the Act, which the Court below adopted, has never before been urged in circumstances

such as are here present. Cf. *Bank of the Philippine Islands* v. *Rogers*, 165 F. Supp. 100 (D.C. 1958), aff'd 281 F. 2d 12 (D. C. Cir. 1959), Pet., pp. 25, 26. In the face of the indisputable purpose and intent of the Congress, plainly shown by the Act's legislative history, and the Act's consistent construction by both the Congress and the Executive during almost half a century in complete harmony therewith, the indisputably novel and contrary construction espoused by the Court below is manifestly untenable and should not be permitted to stand. See, e. g., *United States* v. *American Trucking Ass'ns.*, 310 U. S. 534 (1940); *United States* v. *Witkovich*, 353 U. S. 194 (1957); *Cole* v. *Young*, 351 U. S. 536 (1956); *United States* v. *Jackson*, 280 U. S. 183 (1930); *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111 (1947).

III

Contrary to what respondent would imply, pp. 9-11, petitioner makes no contention hinged upon the termination of *hostilities*. Petitioner's contention is, rather, that *after* the enemy has been driven out of Allied or American territory in the course of a war, and the *enemy's occupation* of such territory has thus been terminated, property of residents and corporations of such territory may not be seized and confiscated as booty, and that if such property should be seized *after* the enemy occupation has ended, its owner may recover it in an action under §9(a). The distinction is significant, for by confusing the two, respondent would confound, pp. 11, 12, residents and corporations of Allied and American territory previously, but no longer overrun and occupied by the enemy, with residents and corporations of the enemy

country itself. But, although, as respondent says, p. 9, "Congress drew no * * * distinction between enemies during and after hostilities", it did draw a sharp distinction, as have the Department of State, the Alien Property Custodian, and the respondent's predecessors as Attorney General, between residents and corporations of an enemy country, and residents and corporations of Allied territory which had formerly been occupied by the enemy. Pet., pp. 19-21, 25-27.

However, being unable to refute the impact on his contention of the Act's legislative history, and its consistent prior Congressional and Executive construction in the forty-five years since its enactment, respondent would apparently inject into the case, and address himself to questions not present. This would appear borne out by his curious and otherwise inexplicable reliance, p. 11, on the proviso of the Joint Resolution of October 19, 1951. Petitioner has made no contention based on the termination of the state of war by the Joint Resolution, and petitioner's position is clear that its right to sue under §9(a) dates from the moment its property was vested some ten months earlier, at which time the fifth anniversary of the termination of the enemy's occupation of the Netherlands had already been celebrated.

IV

Respondent's resort, pp. 11, 12, to what he calls the "underlying policy" and "two purposes" of the Act, lays bare the utter poverty of his contention. The seizure of petitioner's property in 1950-1951, long after both the termination of the enemy's occupation

of the Netherlands and the enemy's unconditional surrender, could not in the nature of things serve the first "purpose", i.e., seizure "prevents the enemy from using such property in its war effort". For, at the time of the seizure, the property was manifestly beyond the enemy's reach, if, indeed, it was ever within it. Pet., pp. 14-18. While, the confiscation of petitioner's property might well serve the second "purpose", i.e., "it enables the United States to use the property in its own war effort", the question is not whether confiscation would augment the Government's treasure, but whether the Act is properly construed as authorizing its augmentation by the confiscation of property of residents and corporations of Allied and American territories previously occupied by the enemy at some time during the war. Pet., p. 18. The legislative history of the Act, and its consistent prior construction by the Congress and the Executive during the forty-five years since its enactment, make it clear that it is not. Pet., pp. 19-28. But to that respondent does not address himself.

V

Respondent asserts, p. 8, that "the only difference" between this case and *Bank Voor Handel en Scheepvaart N.V. v. Kennedy*, 288 F.2d 375 (D.C. Cir. 1961) cert. den. 366 U.S. 962, is that "in the *Voor Handel* case the vesting took place during the enemy occupation of the Netherlands and in the present case it took place after such occupation [had terminated] but prior to termination of the state of war." That this distinction is not "immaterial" as respondent claims, p. 8, is borne out by pre-existing law, typified by *Thirty Hogs-*

Lands of Sugar v. *Boyle*, 9 Cran. 191 (1815), Pet., p. 24, which it was the express purpose of the Act "to define and mitigate", H. R. Rep. 85, 65th Cong., 1st Sess. (1917) 2, Pet., p. 23.

Moreover, that the property in *Voor Handel* was seized *during* the enemy occupation, while here it was seized *after* the enemy occupation had come to an end, is not the only difference between the two cases. For, as respondent carefully pointed out in his brief in opposition in that case, No. 958, October Term 1960, pp. 2, 3, there it had been administratively determined, after a full hearing under §32, that the petitioners in that case, although Netherlands corporations, "were beneficially owned by a Hungarian national residing in Switzerland * * * [who,] acting through an agent, was engaged in extensive wartime business operations in Germany; and that petitioners were enemy tainted because of the enemy character of their owner". Indeed, respondent included in his brief in opposition in *Voor Handel*, as Appendix B thereto, the full text of the 25-page administrative decision which he thus summarized. Either the administrative disposition of the case was relevant to the petition for certiorari in *Voor Handel*, or the respondent's brief in opposition in that case was a flagrant attempt at unwarranted prejudice.

This petitioner considers it to have been relevant, and by the same token that it is relevant here that petitioner's administrative claim was never heard or considered on the merits, but was "disallowed" by respondent's predecessor solely for reasons of administrative convenience, and expressly "to remit the claimant whose right to sue is not barred by lapse of time

to his remedy in court and thus avoid the possible *delay and expense* of a double set of hearings". Pet., p. 4. Cf. Resp. B., p. 13, n. 3. Respondent's contention that petitioner has no standing to sue under the Act is not only contrary to the interpretation of the Act inherent in his predecessor's action and explanation of it, but must cast serious doubt on the integrity of the administrative process. The posture into which petitioner has been put by the departure of the respondent and the Court below from the construction of the Act which has heretofore been consistently followed by the Congress and the Executive, more than suggests that the decision below be reviewed by this Court. Cf. *Moser* v. *United States*, 341 U. S. 41 (1951).

Respondent calls attention, p. 8, fn. 1a, to his statement in his brief in opposition in *Voor Handel*, p. 10, that "the administrative program under Section 32 * * * has operated, with very rare exception, to the mutual satisfaction of the Government and of the other governments" concerned. Certainly, the "administrative program" as it operated in this case, exceptional or not, hardly justifies the term, and it can be doubted whether any government can properly find any "satisfaction" whatsoever in it. Moreover, the generality of the respondent's statement must be open to grave doubt in view of the appearance in *Voor Handel* itself of the Netherlands Ambassador as *amicus curiae*, in support of the petition, and the exchange of diplomatic correspondence which preceded his doing so.

VI

Respondent's suggestion, p. 13, that petitioner's remedy is in the Court of Claims is reminiscent of the contention one of his predecessors made with notable lack of success in *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480 (1947). For, there it was held that where as here, World War II property has been vested under §5(b) of the Act, as amended, the remedy is under §9(a) no less than in the case of a World War I seizure made under §7. The other cases respondent cites, p. 13, are not in point. The first merely holds that property of a friendly alien can be constitutionally vested under §5(b), as amended, in view of his constitutional right to just compensation. Certainly, restitution under §9(a) is no less. The second merely holds that an American corporation which transfers to the United States debentures theretofore issued by it to foreigners, and which the United States has vested under §5(b), will have a right to just compensation to the extent that it may be required by a foreign court to make payment to the original debenture-holders or their assignees. The third case does not involve any seizure or vesting under the Trading with the Enemy Act.

Petitioner's remedy, as this Court held in *Uebersee* is under §9(a), and not in the Court of Claims. Petitioner does not contend, as respondent seems to think, pp. 10-14, that the seizure of its property was unlawful, for under §5(b), as construed by *Uebersee*, the vesting was wholly authorized. Petitioner's contention, rather, is that the novel construction of §2(a) by

the Court below, that residents and corporations of Allied and American territory formerly occupied by the enemy at any time during the course of a war, are themselves enemies, ineligible as such to sue under §9(a) for the recovery of their property which had been vested *after* the enemy occupation of such territory had been terminated, is so obviously of doubtful constitutional validity that it should be avoided. *Guessefeldt* v. *McGrath*, 342 U. S. 308 (1952). Pet., pp. 33-37. Put otherwise, it is petitioner's contention that while the *seizure* of its property may have been lawful, the *confiscation* of its property, which must result if petitioner is denied all remedy under §9(a), is not. Pet., pp. 33-37. Contrary to respondent's view, p. 13, petitioner does not contend that §9(a) be "rewritten". On the contrary, petitioner's contention is that the Court below should not have construed §2(a) in a manner wholly at variance with the meaning with which it has been consistently read by the Congress and the Executive for over forty-five years.

VII

Respondent's short answer, p. 13, fn. 5, to the constitutional question is that §32, "providing for the recovery of vested property by certain 'technical enemies', affords a measure of discretionary and administrative relief to our allies and friends." Petitioner, as a Netherlands corporation, was clearly eligible for return under §32, without regard to the former enemy occupation of the Netherlands but the only "measure" of relief afforded was to disallow its

claim without any consideration of its merits, solely for reasons of administrative convenience, and to "remit" the petitioner to its remedy under §9(a). Pet., p. 4. Now the respondent, who also administers §32, would deny that the petitioner has any remedy under §9(a). Certainly, the Constitution entitles residents and corporations of Allied territories formerly occupied by the enemy—"our allies and friends"—to more than that. Pet., pp. 33-37. The construction of §2(a) consistently followed by the Congress and the Executive for more than forty-five years, but abandoned by the Court below, would assure "our allies and friends" of the full measure of their constitutional rights.

Respondent's quotation from *Guessefeldt*, and his reference, p. 13, fn. 5, to H. Rept. 1269, 79th Cong., 1st Sess. (1945) are undoubtedly intended to suggest that only those without relief under §9(a) were intended relief by §32. But even if true, this was so only in a very special sense for the bill which became §32 originated with the Executive Branch, which then considered the whole of §9 as being inoperative. It was only in 1947, and perforce this Court's decision in *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, that the Executive Branch finally abandoned its position that one of the effects of the amendment of §5(b) was that the only remedy of a person whose property had been vested was "in the Court of Claims by way of a suit for just compensation based on the Fifth Amendment." Resp. B., p. 13. It is in this light that H. Rept. 1269, and respondent's quotation from *Guessefeldt*, which is derived from it, must be read.

Conclusion

The importance of the question posed by this petition, Pet., pp. 11-13, 28, is not lessened by respondent's statistics, p. 8, fn. 1a, that *only* 621 claims for the return of vested property are still pending. For, the sections of the Act here concerned are permanent legislation, Pet., p. 13, and in this volatile world millions of "our allies and friends" in any part of the globe may find themselves overrun at any time by our common enemy. It should be authoritatively determined now, both in their interests and in the interests of the United States, whether in such circumstances their property in this country will be subject to vesting and confiscation even after the enemy has been driven out. But even if "importance" should hinge on the number of currently pending claims, 621 is a goodly number, even if only 10%, or even 1%, of them should involve the issues with which this petition is concerned.

It may be appropriate to suggest that it could serve the interests of the United States no less than those of "our allies and friends", if the respondent were to reconsider his position here, and were to join in petitioner's prayer that the petition be granted.

Respectfully submitted,

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